Nebraska Law Review

Volume 86 | Issue 3 Article 1

2007

Showup Identifications: A Comprehensive Overview of the Problems and a Discussion of Necessary Changes

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I. INTRODUCTION

Showup identifications ("showups") are pretrial identifications wherein only one individual is placed before an eyewitness for identifi-

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cation.[1] Studies have shown that approximately 40% of eyewitness identifications are mistaken.[2] Moreover, there is substantial support for the notion that misidentifications made pursuant to showups are likely more prevalent than misidentifications made pursuant to lineups or photographic arrays.[3] Despite the unreliability of showup identifications, juries generally rely heavily upon these identifications at trial—like they do all eyewitness identifications—even when the defense presents strong evidence that casts substantial doubt upon the accuracy of the identification.[4] Due to jury insensitivity to this potential for error, juries may be frequently convicting innocent people on the basis of showup misidentifications.

This Article explains that eyewitness misidentifications made pursuant to showups, as well as juror reliance on such misidentifications, result from a combination of factors, including inadequate police procedures for conducting showups, overly lenient admissibility requirements for showup identifications, and judicial failure to admit expert testimony pertaining to eyewitness identifications to aid the jury in evaluating eyewitness identifications. In response to these failings of the current system, this Article recommends restricting when the police may conduct showups, restricting the procedures police officers may use during showups, and heightening the admissibility require-

1. BLACK'S LAW DICTIONARY 1413 (8th ed. 2004).

2. Aldert Vrij, *Psychological Factors in Eyewitness Testimony*, *in* PSYCHOLOGY AND LAW: TRUTHFULNESS ACCURACY AND CREDIBILITY 105, 106 (Amina Memon, Aldert Vrij & Ray Bull eds., 1998).

3. *See* Richard Gonzalez, Phoebe C. Ellsworth & Maceo Pembroke, *Response Biases in Lineups and Showups*, 64 J. PERSONALITY & SOC. PSYCHOL. 525, 525 (1993) ("In a recent survey of psychological experts in the field of eyewitness testimony, 78% of the sample agreed that 'the use of a one-person showup instead of a full lineup increases the risk of misidentification,' and 65% felt that the evidence for [that] proposition was generally reliable or very reliable." (citation omitted)); R. C. L. Lindsay et al., *Simultaneous Lineups, Sequential Lineups, and Showups: Eyewitness Identification Decisions of Adults and Children*, 21 LAW & HUM. BEHAV. 391, 393–402 (1997) (finding an increased rate of misidentification pursuant to showup identifications made by children); Willem A. Wagenaar & Nancy Veefkind, *Comparison of One-Person and Many-Person Lineups: A Warning Against Unsafe Practices*, *in* PSYCHOLOGY AND LAW: INTERNATIONAL PERSPECTIVES 275, 283–84 (Friedrich Lösel et al. eds., 1992) (noting that one-person identifications "[should] be avoided as they increase the likelihood of false identifications"); Gary L. Wells, *Police Lineups: Data, Theory, and Policy*, 7 PSYCHOL. PUB. POL'Y & L. 791, 795 (2001) (explaining that a "lineup is superior [to a showup] because it can control errors by spreading errors to the fillers ('known errors'), whereas an error with a show-up is always an error of mistakenly identifying a suspect"); Jessica Lee, Note, *No Exigency, No Consent: Protecting Innocent Suspects from the Consequences of Non-Exigent Show-Ups*, 36 COLUM. HUM. RTS. L. REV. 755, 759–60 (2005) ("Show-ups are inferior to lineups due to the increased chances for mistaken identification.").

4. *See, e.g.*, Elizabeth F. Loftus, *Incredible Eyewitness*, PSYCHOL. TODAY, Dec. 1974, at 117.

ments for showup identifications. Further, this Article recommends that there be general admissibility of expert testimony pertaining to eyewitness identification should be generally admissible to assist juries in evaluating eyewitness testimony.

Although many scholars have addressed the problems associated with eyewitness identifications, as well as possible solutions, few have addressed the issue specifically within the context of showup identifications. Moreover, legal scholarship has not suggested a *comprehensive* approach recommending changes to police procedures, admissibility requirements, *and* the use of expert witness testimony to address the many problems particular to showup identifications.[5] This Article presents such a comprehensive approach.

II. INACCURATE EYEWITNESS IDENTIFICATIONS

In the early morning hours of June 23, 1984, as a mid-twenties woman left a Bronx, New York convenience store, a man grabbed her from behind, placed a box cutter to her throat, pushed her into a blue and white Grand Prix, and drove away.[6] The woman's kidnapper took her to a nearby park, where he raped and orally sodomized her.[7] The assailant then took the woman to a nearby abandoned building where he raped her again.[8] Before leaving the woman, the perpetrator took her cigarettes and money; cut her face with the box cutter, causing permanent loss of vision in her left eye; and threatened to kill her if she called the police.[9] Before she passed out, the woman saw the back of her assailant as he ran away.[10] Upon regaining consciousness, the woman summoned the police.[11]

The woman told the police that her assailant was "a black male, approximately twenty seven years, wearing a beige shirt, pants."[12] Later, she stated that he was named "Willie" and described him as approximately five-feet and eight-inches tall and "physically large," with a weight of approximately 160 pounds, a short Afro, and a mustache.[13]

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5. Although the focus of this Article is on showup identifications, some of the arguments are equally relevant to other identification procedures, including lineups and photographic arrays.
6. Innocence Project, Know the Cases: Profile—Alan Newton, http://www.innocenceproject.org/Content/227.php (last visited Oct. 25, 2007).
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*

While recuperating in the hospital during the two days after her attack, the woman viewed approximately two hundred photographs.[14] The woman ultimately selected Alan Newton's photograph as the photograph of her attacker.[15] On June 27, 1984, police presented the clerk of the convenience store from which the woman was abducted with a photographic array that included Newton's photograph.[16] The clerk also selected Newton's photograph.[17] Less than a week after the abduction, on June 28, 1984, the victim and the convenience store clerk each identified Newton in a lineup as the assailant.[18] The woman also identified Newton as her attacker at trial.[19] Unfortunately, both the victim and the convenience store clerk identified the wrong person,[20] resulting in Newton also becoming a victim—a victim of eyewitness misidentification.

Newton steadfastly maintained his innocence and presented an alibi defense at his trial.[21] Newton asserted that on the night of the attack he, along with his fiancée, his fiancée's daughter, and other relatives, had attended a showing of *Ghostbusters* at a Brooklyn movie theater and then returned to his fiancée's house where he spent the night and had breakfast.[22] Both Newton's fiancée and his fiancée's daughter corroborated Newton's testimony.[23] Despite the corroborated alibi, in May 1985, Newton was found guilty of numerous charges relating to the June 1984 attack.[24] More than twenty years after the attack, DNA evidence conclusively demonstrated that Newton was not the source of the spermatozoa recovered from the victim immediately after the rapes.[25] In 2006, a joint motion filed by the Bronx County District Attorney's Office and the Innocence Project vacated Newton's conviction.[26] On July 6, 2006, Newton, an innocent man, finally went free.[27]

As horrifying as the above story is for both the victim of the attack and the victim of the misidentification, this story is not unique. Every year almost 80,000 individuals are targeted based on eyewitness iden-

14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*

tification.[28] Yet, studies have shown that approximately 40% of eyewitness identifications are mistaken,[29] resulting in mistaken identification being the leading cause of wrongful conviction such that wrongful convictions based on mistaken identifications are almost equal to the sum of all other errors that lead to wrongful convictions.[30] In fact, one recent study of DNA exonerations revealed that 90% of reviewed cases involved one or more mistaken eyewitness identifications.[31] Hence, eyewitness misidentification is a pervasive problem.[32]

Moreover, studies indicate that the probability of eyewitness misidentification made pursuant to a showup is likely greater than the probability of eyewitness misidentification made pursuant to a lineup

28. *See* Alvin G. Goldstein, June E. Chance & Gregory R. Schneller, *Frequency of Eyewitness Identification in Criminal Cases: A Survey of Prosecutors*, 27 BULL. PSYCHONOMIC SOC'Y 71, 73 (1989).

29. Vrij, *supra* note 2. For example, in one study, black and white "customers" browsed in a convenience store for a few minutes and then went to the register to pay. Stephanie J. Platz & Harmon M. Hosch, *Cross-Racial/Ethnic Eyewitness Identification: A Field Study*, 18 J. APPLIED SOC. PSYCHOL. 972, 974–75 (1988). Researchers asked the convenience store clerks to identify the "customers" from a photo array. *Id.* at 975. The overall accuracy rate for all participants' identifications was only 44.2%. *Id.* at 977.

30. William David Gross, *The Unfortunate Faith: A Solution to the Unwarranted Reliance Upon Eyewitness Testimony*, 5 TEX. WESLEYAN L. REV. 307, 313 (1999) (citing PSYCHOLOGICAL ISSUES IN EYEWITNESS IDENTIFICATION 3–4 (Siegfried Ludwig Sporer et al. eds.,1996)); Ayre Rattner, *Convicted But Innocent: Wrongful Conviction and the Criminal Justice System*, 12 LAW & HUM. BEHAV. 283, 287–91 (1988).

At least 75% of DNA exonerations involve convictions based in part on mistaken eyewitness identifications. *See* Innocence Project, Understand the Causes, http://www.innocenceproject.org/understand/ (last visited Oct. 25, 2007) (noting that 77.7% of 130 postconviction DNA exonerations in the United States involved mistaken eyewitness identifications); *see also* BARRY SCHECK, PETER NEUFELD & JIM DWYER, ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED 246 (Doubleday 2000) (reporting that mistaken eyewitness identifications influenced 84% of the 67 wrongful convictions studied); EDWARD CONNORS, THOMAS LUNDREGAN, NEAL MILLER & TOM MCEWEN, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL (Dep't of Justice 1996), http://www.ncjrs.gov/txtfiles/dnaevid.txt (last visited Oct. 25, 2007) (finding that, of 28 case studies, 86% involved mistaken eyewitness identification).

31. Letter from N.J. Att'y Gen. John J. Farmer, Jr. to All N.J. County Prosecutors et al. 1 (Apr. 19, 2001) (accompanying *Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures, available at* http://www.psychology.iastate.edu/FACULTY/gwells/njguidelines.pdf). Also, the Innocence Project has used DNA evidence to exonerate more than 101 people wrongly convicted of a crime based on mistaken eyewitness identification. Innocence Project, *supra* note 30.

32. As one United States Court of Appeals judge said: "Centuries of experience in the administration of criminal justice have shown that convictions based solely on testimony that identifies a defendant previously unknown to the witness is highly suspect. Of all the various kinds of evidence it is the least reliable, especially where unsupported by corroborating evidence." Jackson v. Fogg, 589 F.2d 108, 112 (2d Cir. 1978).

or photo array.[33] For example, in one study, showups yielded a poorer witness ability to accurately discriminate in making identification decisions regarding a suspect than did six to ten person lineups.[34] In addition, numerous scholars agree that the probability of a showup misidentification is likely much greater than the corresponding probability of a lineup or photographic array misidentification.[35]

Showup misidentifications are likely more prevalent than misidentifications made pursuant to lineups or photographic arrays because many safeguards that exist with other methods of identification, such as lineups and photographic arrays, do not exist for showups. The most important safeguard that exists with lineups and photographic arrays, but that does not exist for showups, is the presentation of more than one person from whom to choose.[36] At the standard police lineup, also known as a simultaneous lineup, the eyewitness is presented with all members of the lineup, usually six to eight individuals, at the same time.[37] At a sequential lineup, the eyewitness still views numerous individuals, but the eyewitness views each lineup member separately, moving through the lineup members in a sequence.[38] And, at photographic arrays, the eyewitness is presented with numerous photographs to view when making her identification.[39] In contrast, at a showup, the eyewitness views only one individual.[40] Thus, as the New Jersey Supreme Court explained in *State v. Herrera*, there exists "the commonsense notion that one-on-one showups are inherently suggestive . . . because the victim can only choose from one person, and, generally, that person is in police custody."[41]

Another important safeguard that exists for many lineups, but for virtually no showups, is the right to have counsel present. Starting in the 1960s, the United States Supreme Court began crafting procedural safeguards intended to shield criminal defendants from wrongful convictions based in part on eyewitness misidentifications.[42] In 1967,

33. *See supra* note 3.
34. Wagenaar & Veefkind, *supra* note 3, at 283–84.
35. *See* Wells, *supra* note 3; Lee, *supra* note 3.
36. *See* Gonzalez et al., *supra* note 3, at 527.
37. Gary L. Wells et al., *From the Lab to the Police Station: A Successful Application of Eyewitness Research*, 55 AM. PSYCHOLOGIST 581, 585 (2000).
38. *Id.* at 586.
39. There are instances when police officers show a photograph of only one person to an eyewitness. This Article does not address the many problems with such an identification procedure.
40. BLACK'S LAW DICTIONARY 1413 (8th ed. 2004).
41. 902 A.2d 177, 183 (N.J. 2006); *see also* PATRICK M. WALL, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES 27–40 (Charles C Thomas 1965) (explaining that courts and experts are in agreement that showups are "grossly suggestive").
42. Amy Klobuchar, Nancy K. Mehrkens Steblay & Hilary Lindell Caligiuri, *Improving Eyewitness Identifications: Hennepin County's Blind Sequential Lineup Pilot Project*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 381, 383–84 (2006).

the Court decided the case of *United States v. Wade*, in which it held that, pursuant to the Sixth Amendment, the right to counsel attaches at all critical stages or pretrial proceedings where "the presence of [defense] counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself."[43] The *Wade* Court explained:

> [T]oday's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality. In recognition of these realities of modern criminal prosecution, our cases have construed the Sixth Amendment guarantee to apply to "critical" stages of the proceedings. The guarantee reads: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel *for his defence.*" The plain wording of this guarantee thus encompasses counsel's assistance whenever necessary to assure a meaningful "defence."[44]

Thus, the *Wade* Court held that the *postindictment* lineup at issue in the case constituted a pretrial confrontation of the accused at which the right to counsel existed[45] because

> [t]he confrontation compelled by the State between the accused and the victim or witnesses to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial. The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification. Mr. Justice Frankfurter once said: "What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials. These instances are recent—not due to the brutalities of ancient criminal procedure."[46]

The presence of counsel at an identification is an important safeguard against eyewitness misidentification because counsel is likely "alert for conditions prejudicial to the suspect" that the suspect is unlikely or unable to notice.[47] In *Moore v. Illinois*, the Court explained that "[i]f an accused's counsel is present at [a] pretrial identification,

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43. United States v. Wade, 388 U.S. 218, 227 (1967).

44. *Id.* at 224–25.

45. *Id.* at 228–39.

46. *Id.* at 228 (quoting FELIX FRANKFURTER, THE CASE OF SACCO AND VANZETTI 30 (1927)). The *Wade* Court further explained:

> "It is a matter of common experience that, once a witness has picked out the accused at the line-up, he is not likely to go back on his word later on, so that in practice the issue of identity may (in the absence of other relevant evidence) for all practical purposes be determined there and then, before the trial."

Id. at 229 (quoting Glanville Williams & H. A. Hammelmann, *Identification Parades—I*, 1963 CRIM. L. REV. 479, 482).

47. *Id.* at 230–31. Moreover, it is likely that police officers conducting a showup identification in the presence of defense counsel will refrain from engaging in suggestive behaviors.

he can serve both his client's and the prosecution's interests by objecting to suggestive features of a procedure before they influence a witness' identification."[48]

Yet, unfortunately, the right to counsel at an eyewitness identification extends to virtually no showups, although it extends to a great number of lineups.[49] In *Kirby v. Illinois*, the Court held that the Sixth Amendment right to counsel does not extend to *preindictment* identifications because the Sixth Amendment right to counsel "attaches only at or after the time that adversary judicial proceedings have been initiated"[50] by way of "formal charge, preliminary hearing, indictment, information, or arraignment."[51] Since *Kirby* involved a preindictment showup, the Court held that the right to counsel did not attach to that identification.[52]

Because the Supreme Court has held that the right to counsel does not extend to a preindictment identification, regardless of the method

48. Moore v. Illinois, 434 U.S. 220, 225 (1977); *see also* Solomon v. Smith, 645 F.2d 1179, 1187 (2d Cir. 1981) (noting that counsel might have forestalled the showup, limited the duration of the witness's observation, or precipitated a proper lineup).

49. Notably, the right to counsel does extend to rarely conducted postindictment showups. *See Solomon*, 645 F.2d at 1187 (explaining that the right to counsel attaches at a postindictment showup).

50. Kirby v. Illinois, 406 U.S. 682, 688 (1972).

51. *Id.* at 689. The United States Supreme Court has repeatedly reaffirmed its holding in *Kirby*. *See* Fellers v. United States, 540 U.S. 519, 523 (2004) ("The Sixth Amendment right to counsel is triggered 'at or after the time that judicial proceedings have been initiated . . . whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" (quoting Brewer v. Williams, 430 U.S. 387, 398 (1977))); McNeil v. Wisconsin, 501 U.S. 171, 175 (1991) ("The Sixth Amendment right . . . does not attach until a prosecution is commenced, that is 'at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" (quoting United States v. Gouveia, 467 U.S. 180, 188 (1984))); *Gouveia*, 467 U.S. at 187–88 (1984) (The Sixth Amendment right to counsel "attaches only at or after the time that adversary judicial proceedings have been initiated against him," which occurs "'by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" (quoting *Kirby,* 406 U.S. at 688–89)).

In addition, the vast majority of state courts to address the issue post-*Kirby* have also held that the Sixth Amendment right to counsel does not extend to preindictment identifications. *See, e.g.*, Campbell v. State, 426 S.E.2d 45, 46 (Ga. Ct. App. 1992); People v. Williams, 614 N.E.2d 7, 8–9 (Ill. App. Ct. 1991); Parsley v. State, 557 N.E.2d 1331, 1334–35 (Ind. 1990); State v. Ronnebaum, 449 N.W.2d 722, 724 (Minn. 1990); Wilson v. State, 451 So. 2d 718, 722 (Miss. 1984); People v. Hawkins, 435 N.E.2d 376, 379–80 (N.Y. 1982); State v. Mills, 582 N.E.2d 972, 984–85 (Ohio 1992); Commonwealth v. Rishel, 582 A.2d 662, 665–66 (Pa. Super. Ct. 1990); State v. Parizo, 655 A.2d 716, 717–18 (Vt. 1994).

However, it is noteworthy that at least two state courts have held post-*Kirby* that, pursuant to their state constitutions, a defendant is entitled to counsel at a preindictment lineup. Blue v. State, 558 P.2d 636, 640–42 (Alaska 1977); People v. Bustamente, 634 P.2d 927, 935–36 (Cal. 1981).

52. *Kirby*, 406 U.S. at 689.

of identification, the right to counsel safeguard likely does not extend to most showups because showups are generally conducted preindictment.[53] Hence, lacking the safeguard of the right to counsel, showup misidentifications are likely more prevalent than are postindictment lineup misidentifications.

Although there is no Sixth Amendment right to counsel at a photographic array identification, such a safeguard is not nearly as necessary to protect against misidentification because the absence of a live person at a photographic identification ensures that there are far fewer possibilities for unfair influence than during a live identification.[54] In Justice Stewart's concurrence in *United States v. Ash*, he explained:

> A photographic identification is quite different from a lineup, for there are substantially fewer possibilities of impermissible suggestion when photographs are used, and those unfair influences can be readily reconstructed at trial. It is true that the defendant's photograph may be markedly different from the others displayed, but this unfairness can be demonstrated at trial from an actual comparison of the photographs used or from the witness' description of the display. Similarly, it is possible that the photographs could be arranged in a suggestive manner, or that by comment or gesture the prosecuting authorities might single out the defendant's picture. But these are the kinds of overt influence that a witness can easily recount and that would serve to impeach the identification testimony. In short, there are few possibilities for unfair suggestiveness—and those rather blatant and easily reconstructed. Accordingly, an accused would not be foreclosed from an effective cross-examination of an identification witness simply because his counsel was not present at the photographic display. For this reason, a photographic display cannot fairly be considered a "critical stage" of the prosecution. As the Court of Appeals for the Third Circuit aptly concluded: "If . . . the identification is not a live lineup at which defendant may be forced to act, speak or dress in a suggestive way, where the possibilities for suggestion are multiplied, where the ability to reconstruct the events is minimized, and where the effect of a positive identification is likely to be permanent, but at a viewing of immobile photographs easily reconstructible, far less subject to subtle suggestion, and far less indelible in its effect when the witness is later brought face to face with

53. While exact data on the prevalence of preindictment and postindictment showups is not available, most of the cases involving showups involve preindictment challenges. *See* cases cited *supra* note 51. A LexisNexis search revealed only a handful of cases involving postindictment showups. *See* Thompson v. Mississippi, 914 F.2d 736 (5th Cir. 1990); Cannon v. Alabama, 558 F.2d 1211 (5th Cir. 1977); People v. Hunt, 388 N.Y.S.2d 335 (N.Y. App. Div. 1976); State v. Davis, 1996 Ohio App. LEXIS 4247 (Ohio Ct. App. Sept. 20, 1996). Thus, a safe assumption is that preindictment showups, at which the right to counsel does not attach per *Kirby*, greatly outnumber postindictment showups. Moreover, logic dictates that once a defendant is indicted, police employment of a showup, as opposed to another identification procedure, such as a lineup, seems unlikely.

54. United States v. Ash, 413 U.S. 300, 324–25 (1973) (Stewart, J., concurring) (concluding that a postindictment photographic identification is not a "critical stage" of the prosecution, and, thus, a defendant does not have a Sixth Amendment right to the presence of counsel at the photographic identification).

> the accused, there is even less reason to denominate the procedure a critical stage at which counsel must be present."[55]

Therefore, although the probability of eyewitness misidentification is great regardless of the specific identification method used, fewer safeguards exist at showups, increasing the probability of a showup misidentification relative to the probability of misidentification pursuant to a lineup or a photographic array.[56]

III. JURY RELIANCE ON EYEWITNESS IDENTIFICATIONS

Despite the frequency of eyewitness misidentification, jurors generally believe eyewitness identifications even when the defense presents reliable evidence that casts substantial doubt on the eyewitness's identification.[57] As the United States Supreme Court has observed:

> [D]espite its inherent unreliability, much eyewitness identification evidence has a powerful impact on juries . . . . 'All the evidence points rather strikingly to the conclusion that there is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says, "That's the one!"'[58]

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55. *Id.* at 324–25 (quoting United States *ex rel.* Reed v. Anderson, 461 F.2d 739, 745 (3d Cir. 1972)).

56. There is little debate that an identification made pursuant to a photographic array is less reliable than an identification made pursuant to a lineup. *See* Manson v. Brathwaite, 432 U.S. 98, 132 (1977) (Marshall, J., dissenting) ("Because photos are static, two-dimensional, and often outdated, they are 'clearly inferior in reliability' to corporeal procedures." (quoting WALL, *supra* note 41, at 70)). Notwithstanding the failings of photographs, it is likely that an identification made pursuant to a photographic array is more reliable than a showup identification given the lack of safeguards that exist at a showup identification that are present at a photographic array. *See* State v. Dubose, 699 N.W.2d 582, 594 (Wis. 2005) ("A lineup or photo array is generally fairer than a showup, because it distributes the probability of identification among the number of persons arrayed, thus reducing the risk of a misidentification.").

57. Cindy J. O'Hagan, Note, *When Seeing is Not Believing: The Case for Eyewitness Expert Testimony*, 81 GEO. L.J. 741, 750 (1993) (noting that there are numerous cases illustrating how juries often believe dubious eyewitnesses).

58. Watkins v. Sowders, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting) (emphasis omitted) (quoting ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY 19 (Harvard Univ. Press 1979)). The Second Circuit Court of Appeals, in a case involving eyewitness identification, noted:

> > There can be no reasonable doubt that inaccurate eyewitness testimony may be one of the most prejudicial features of a criminal trial. Juries, naturally desirous to punish a vicious crime, may well be unschooled in the effects that the subtle compound of suggestion, anxiety, and forgetfulness in the face of the need to recall often has on witnesses. Accordingly, doubts over the strength of the evidence of a defendant's guilt may be resolved on the basis of the eyewitness' seeming certainty when he points to the defendant and exclaims with conviction that veils all doubt, "'[T]hat's the man!'"
>
> Kampshoff v. Smith, 698 F.2d 581, 585 (2d Cir. 1983) (quoting United States v. Wade, 388 U.S. 218, 235–36 (1967)).

Psychological research indicates that juries believe eyewitness identifications most of the time, regardless of whether circumstances suggest the identification is incorrect.[59] One study examined three sets of mock jurors at an experimental robbery trial.[60] All three sets of jurors were presented with the same evidence.[61] However, the first set of mock jurors was told that no eyewitness existed, and only 18% voted to convict the defendant.[62] The second set of mock jurors heard a clerk testify that he saw the robbery and that the defendant was the robber he had seen.[63] The defense attorney argued that the clerk was mistaken.[64] Seventy-two percent of the second set of mock jurors voted to convict the defendant.[65] The third set of mock jurors observed a clerk who testified that he saw the robbery and who stated that the defendant was the robber; however, the defense attorney discredited this clerk by compelling the clerk to admit that he was legally blind and not wearing his glasses at the time of the robbery.[66] Despite the suspect nature of the eyewitness identification presented, 68% of the third set of mock jurors still voted to convict.[67] Thus, jurors have a strong propensity to believe eyewitness identifications, even when the identification is of dubious reliability.

In the same vein, in the absence of other culpatory evidence, jurors will convict a defendant based solely on eyewitness testimony; a study conducted in the United Kingdom reported an approximate 75% conviction rate when eyewitness testimony was the only evidence against the defendant presented at trial.[68] And, in approximately half of those cases, there was only one eyewitness.[69]

Beyond studies, American history is replete with real life illustrations of juries believing tenuous eyewitness identifications despite the presentation of reliable defense evidence or the absence of corroborating evidence. For example, Payne Boyd, tried three times for the same murder, was convicted largely on the basis of the identifications made by eight eyewitnesses who testified that he was the murderer.[70] Eight

59. *See, e.g.*, Loftus, *supra* note 4.
60. Loftus, *supra* note 4, at 117–18.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. LORD DEVLIN, REPORT TO THE SECRETARY OF STATE FOR THE HOME DEPARTMENT OF THE DEPARTMENTAL COMMITTEE ON EVIDENCE OF IDENTIFICATION IN CRIMINAL CASES 162–63 (London, 1976).
69. *Id.*
70. EDWIN M. BORCHARD, CONVICTING THE INNOCENT 23–27 (Yale Univ. Press 1932) (citing State v. Boyd, record on file with the Clerk of Circuit Court, Cabell County, W. Va. (1925)).

positive identifications seems impressive until one realizes that there were fifty-five witnesses at Boyd's trial, thirty-one of whom were positive that Boyd had not committed the murder.[71] Despite the conflicting eyewitness testimony, Boyd was convicted.[72] Boyd ultimately served a year and a half of a life sentence before his exoneration.[73]

The case of Harry Cashin, whose murder conviction was reversed on appeal, provides an example of a jury that believed a problematic eyewitness identification, despite the presence of strong defense evidence suggesting that the identification was likely erroneous.[74] At Cashin's trial, the sole culpatory evidence was a single eyewitness who had failed to make a positive identification previously; no other witness to the crime identified Cashin.[75] Furthermore, Cashin did not resemble the description of the murderer given by other eyewitnesses,[76] and Cashin had an alibi corroborated by his fiancée and his fiancée's aunt.[77] Despite the fact that the only evidence against Cashin was a solitary questionable eyewitness identification, the jury convicted Cashin of murder.[78]

The *Sacco-Vanzetti* case provides another example of juror reliance on a questionable identification.[79] One witness, Mary Splaine, testified:

> I noticed particularly the left hand was a good sized hand, a hand that denoted strength . . . . The forehead was high. The hair was brushed back and it was between, I should think, two inches and two and one-half inches in length and had dark eyebrows, but the complexion was a white, peculiar white that looked greenish.[80]

The basis for Splaine's identification in this case was her glimpse of the perpetrator, from a distance of at least 60 feet, as he drove by.[81] Despite the implausibility of the eyewitness's identification, at least two jurors were "greatly impressed by it."[82]

A more modern problematic eyewitness identification believed and relied upon by a jury is that of Kenneth Solomon.[83] On October 7,

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71. *Id.*
72. *Id.*
73. *Id.*
74. People v. Cashin, 182 N.E. 74 (N.Y. 1932).
75. *Id.* at 75–76.
76. *Id.* at 76. For example, it was likely the actual murderer had an injury, yet Cashin was not injured. *Id.*
77. *Id.*
78. *Id.*
79. O'Hagan, *supra* note 57, at 750 n.62; *see also* COMMONWEALTH VS. SACCO AND VANZETTI 25–35 (Robert P. Weeks ed., 1958) (providing a transcript of the testimony of Mary Splaine) [hereinafter COMMONWEALTH].
80. COMMONWEALTH, *supra* note 79, at 27.
81. *Id.* at 31.
82. O'Hagan, *supra* note 57, at 750 n.62 (quoting COMMONWEALTH, *supra* note 79, at 27).
83. *See* Solomon v. Smith, 645 F.2d 1179, 1181 (2d Cir. 1981).

1974, three black males, one of whom was wearing a hood, robbed a doctor's office and also raped and sodomized receptionist Nancy Padovani.[84] One day after the crime, Padovani selected a picture of Solomon in a manner characterized by the police as a "negative," but "possible," identification.[85]

In a subsequent biased lineup at which all the other lineup participants were significantly taller than Solomon except for one individual who weighed sixty-five pounds more than Solomon, Padovani identified Solomon as her attacker.[86] However, prior to the lineup, the police had shown Solomon's photograph to Padovani several times, and Padovani had viewed Solomon, who was without counsel, at a protracted showup at Solomon's own arraignment.[87] In contrast, at an unsuggestive lineup, in which Solomon was not a participant, Padovani selected another individual who better fit her initial description of her attacker.[88]

The only evidence presented against Solomon by the prosecution was eyewitness testimony.[89] Despite the extremely dubious identification of Solomon by Padovani and the lack of any non-eyewitness evidence corroborating Padovani's identification, the jury convicted Solomon of robbery, rape, and sodomy.[90] Several years later, the United States District Court for the Southern District of New York granted Solomon's writ of habeas corpus on the basis that the identification of Solomon had violated his Fifth, Sixth, and Fourteenth Amendment rights.[91] The United States Court of Appeals for the Second Circuit affirmed the District Court's decision.[92]

Hence, it is clear that jurors believe, and subsequently convict defendants on the basis of, doubtful eyewitness identifications—even when the defense has presented strong contradictory evidence and when evidence corroborating the identification is absent.

IV. PROCEDURES EMPLOYED BY POLICE OFFICERS

Given the frequency of showup misidentifications, the greater risk of showup misidentifications relative to lineup misidentifications, and jury reliance on dubious identifications to convict, comprehensive changes to the entire criminal justice system, including police proce-

84. *Id.* at 1182.
85. *Id.*
86. *Id.* at 1183. Padovani also identified Solomon as her attacker at trial. *Id.* at 1181.
87. *Id.* at 1181–82.
88. *Id.* at 1182.
89. *Id.* at 1181.
90. *Id.*
91. *Id.*
92. *Id.* at 1182.

dures, are necessary. This part of the Article sets forth procedures that should be required of and employed by all police officers.

A. Exigency

Showups should be conducted only when necessitated by exigency such that conducting a lineup or photographic array is impracticable.[93] Exigency may exist in numerous instances. One instance of exigency is when the eyewitness is likely dying and is not well enough to travel to the police station or jail to observe a lineup, and the police cannot conduct a proper lineup outside of a police station or a jail.[94] In such an instance, it is appropriate for police officers to conduct a showup because it is the only way the police can obtain an identification. Exigency might also exist when police officers must *immediately* determine whether they have the right person in custody. For example, when a potential victim's life is at risk, police officers must determine immediately whether the suspect they have in custody is the perpetrator. Another example is when a suspect is fleeing, yet the police officers lack probable cause to detain the suspect at the police station for a period of time sufficient to conduct a lineup.[95]

A ban on the use of showups absent exigent circumstances places minimal additional burden on police officers but would likely decrease the overall number of eyewitness misidentifications made given the ban's probable drastic reduction in the number of showups conducted.[96] Unfortunately, although some police departments have developed internal guidelines requiring that showups be conducted only when exigency mandates,[97] many police departments regularly con-

93. *See* Lee, *supra* note 3, at 755 (advocating for an exigent circumstances prerequisite before police officers may conduct showups).

94. *See* Stovall v. Denno, 388 U.S. 293, 302 (1967) (explaining that a showup at the victim's hospital room was necessary because the victim was the only person who could identify the suspect, no one knew how long the victim would live, and despite the hospital's close proximity, the victim was unable to go to the jail or the police station for a proper lineup due to her health). It is noteworthy that although conducting a lineup in a hospital room is not feasible, conducting a photographic array might be feasible so long as the eyewitness's health prevails long enough for the police to put together an appropriate photographic array.

95. *See* Lee, *supra* note 3, at 763 (noting that exigency exists when "the suspect is fleeing").

96. It is true, however, that prohibiting police officers from conducting showups absent exigency will not increase the reliability of an identification made pursuant to a showup.

97. *See, e.g.*, LA CROSSE POLICE DEPARTMENT, GENERAL ORDERS MANUAL § 19.3.05 (Jul. 18, 2007), http://www.cityoflacrosse.org/DocumentView.asp?DID=385 (last visited Oct. 25, 2007); Metropolitan Police Department Washington D.C., Pretrial Eyewitness Identification (Nov. 25, 1974), http://www.lefande.com/MPDGOs/304.07.htm (last visited Oct. 25, 2007).

duct showups absent exigent circumstances.[98] In order to reduce the number of showups conducted, which in turn will reduce the number of showup misidentifications made, every police department should have a *mandatory* policy prohibiting showups except when police officers are presented with exigent circumstances.

B. Close Temporal Proximity

Showups should be conducted only in close temporal proximity to the time when the eyewitness first viewed the criminal (i.e., the "witnessing event"). "'One of the most stable findings of psychological research is that verbal information and pictorial information tend to be forgotten as time passes.'"[99] An eyewitness's memory, however, does not deteriorate gradually, but rather deteriorates rapidly immediately after an event and then deteriorates little over extended time.[100] One eyewitness expert found that after twenty-four hours, "[m]emory for physical attributes of strangers' age, hair color, and height are usually inaccurate."[101] In fact, within only a few hours of the witnessing event, studies suggest that facial features are often forgotten.[102]

Therefore, eyewitness identifications, conducted in any fashion, are less reliable when conducted after a delay. However, when the identification is delayed, the probability of the eyewitness making a misidentification is significantly greater when the identification is made pursuant to a showup than when the identification is made pursuant to a lineup. One study found that the percentage of mistaken identifications that occurred right after an event took place was 16% for a lineup and 18% for a showup.[103] Only twenty-four hours later,

98. *See* State v. Herrera, 902 A.2d 177, 197 (N.J. 2006) (Albin, J., dissenting) ("Despite the widespread condemnation of the unnecessary use of showups, the police continue to employ the technique in unwarranted circumstances."); Steven P. Grossman, *Suggestive Identifications: The Supreme Court's Due Process Test Fails to Meet Its Own Criteria*, 11 U. BALT. L. REV. 53, 59–60 (1981) (noting that police use of showups flourishes under a totality of the circumstances approach); Lee, *supra* note 3, at 768 (explaining that showups are "still routinely used in the field and in the stationhouse").

99. Lee, *supra* note 3, at 769–70 (quoting KATHERINE W. ELLISON & ROBERT BUCKHOUT, PSYCHOLOGY AND CRIMINAL JUSTICE 103 (Harper & Row 1981) (citing WAYNE A. WICKELGREN, LEARNING AND MEMORY (Prentice-Hall 1977))).

100. *See* LOFTUS, *supra* note 58, at 53; JOHN W. SHEPHERD, HADYN D. ELLIS & GRAHAM M. DAVIES, IDENTIFICATION EVIDENCE: A PSYCHOLOGICAL EVALUATION 80–86 (Aberdeen Univ. Press 1982); Samuel R. Gross, *Loss of Innocence: Eyewitness Identification and Proof of Guilt*, 16 J. LEGAL STUD. 395, 399 (1987).

101. A. DANIEL YARMEY, UNDERSTANDING POLICE AND POLICE WORK: PSYCHOSOCIAL ISSUES 298–99 (N.Y. Univ. Press 1990).

102. *Id.* at 299 (noting that memory for most information appears to deteriorate quickly after a witnessing event).

103. A. Daniel Yarmey et al., *Accuracy of Eyewitness Identifications in Showups and Lineups*, 20 LAW & HUM. BEHAV. 459, 464 (1996); Lee, *supra* note 3, at 770 (discussing the findings of the Yarmey study).

the percentage of lineup misidentifications was 14%, whereas the percentage of showup misidentifications was 53%.[104] Thus, because as time passes the likelihood of a showup misidentification rapidly outpaces the probability of a lineup misidentification, police departments ought to adopt mandatory policies prohibiting the use of showups except when the showup will take place in close temporal proximity to the eyewitness's initial observation of the criminal.

C. Suggestive Behaviors

When conducting showup identifications, police officers must avoid suggestive behaviors, such as showing the suspect to the witness more than once or showing the suspect to the witness while the suspect is in a squad car, because suggestive identifications have no beneficial value.[105] As one commentator has noted:

> Unnecessarily suggestive pretrial identification procedures differ from most other improper law enforcement activities because they do not further any valid law enforcement interest. Although a violation of a suspect's fourth or fifth amendment rights—for example, a warrantless search or an interrogation without a lawyer present—is plainly wrong, it might at least further the valid law enforcement objective of collecting relevant evidence. By contrast, an unnecessarily suggestive identification procedure simply creates unreliable evidence where reliable evidence could have been gathered. It is not a case where good ends justify bad means—the end result of an unnecessarily suggestive procedure is worthless precisely because of the means used.[106]

As such, police departments ought to adopt mandatory policies prohibiting police officers from engaging in certain specified suggestive behaviors when conducting showups.

To determine what suggestive behaviors should be per se prohibited, one should start by looking to the sound teachings of the Wisconsin Supreme Court.[107] The Wisconsin Supreme Court, in *State v. Dubose*, stated:

> [I]t is important that showups are not conducted in locations, or in a manner, that implicitly conveys to the witness that the suspect is guilty. Showups conducted in police stations, squad cars, or with the suspect in handcuffs that are visible to any witness, all carry with them inferences of guilt, and thus should be considered suggestive . . . . [Also], it is important that a suspect be shown to the witness only once. If a suspect is identified, the police have no reason to conduct further identification procedures. Conversely, if the suspect is not identified by the witness, he or she should not be presented to that witness in any subsequent showups.[108]

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104. Yarmey et al., *supra* note 103, at 464; Lee, *supra* note 3, at 770 (discussing the findings of the Yarmey study).

105. *See* Benjamin E. Rosenberg, *Rethinking the Right to Due Process in Connection with Pretrial Identification Procedures: An Analysis and a Proposal*, 79 KY. L.J. 259, 291 (1991).

106. *Id.*

107. *See* State v. Dubose, 699 N.W.2d 582 (Wis. 2005).

108. *Id.* at 594.

Mandatory policies prohibiting police officers from engaging in the above-discussed suggestive showup procedures place minimal burdens on police officers but might significantly reduce the number of *suggestive* showup identifications conducted, which in turn likely will reduce the number of showup *misidentifications* made.[109] Thus, such suggestive behaviors should be prohibited.

D. Proactive Procedures

When conducting showup identifications, in addition to refraining from the overt suggestive behaviors discussed above, police officers should engage in certain proactive specified behaviors that will decrease inadvertent suggestiveness. Because suggestive identifications have no beneficial value,[110] police officers must do everything in their power to eliminate suggestive identifications, which includes being proactive. The Wisconsin Supreme Court has suggested one important proactive procedure whereby police officers tell an eyewitness "that the real suspect may or may not be present, and that the investigation will continue regardless of the result of the impending identification procedure."[111] The Wisconsin Supreme Court explained that such a procedure is beneficial because "a witness's memory of an event can be fragile and . . . the amount and accuracy of the information obtained from a witness depends in part on the method of questioning."[112] Again, this proactive procedure places minimal burden on the police officers conducting the showup but may reduce the number of misidentifications made pursuant to showups. Thus, all police departments should mandate the use of this proactive procedure.[113]

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109. Another unnecessarily suggestive behavior from which police officers should refrain is giving postidentification feedback to an eyewitness. Confirmatory postidentification feedback, such as "You identified the correct person" has resulted in "eyewitnesses indicating greater certainty in the identification, a better view of the [criminal], a greater ability to make out details of the [criminal's] face, greater attention to the event, . . . [and] greater willingness to testify." *E.g.*, Donald P. Judges, *Two Cheers for the Department of Justice's* Eyewitness Evidence: A Guide for Law Enforcement, 53 ARK. L. REV. 231, 267 (2000) (citing Gary L. Wells & Amy L. Bradfield, *"Good, You Identified the Suspect": Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience*, 83 J. APPLIED PSYCHOL. 360, 366 (1998)).

110. *See* Rosenberg, *supra* note 105.

111. *Dubose*, 699 N.W.2d at 594.

112. *Id.* (quoting NAT'L INST. OF JUSTICE, U.S. DEP'T. OF JUSTICE, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT 3–4 (1999)).

113. Another proactive procedure is the blind administration of identification procedures. A blindly administered showup is one whereby the officer conducting the showup does not know the identity of the person targeted. *See* Winn S. Collins, *Looks Can be Deceiving: Safeguards for Eyewitness Identification*, WIS. LAW., Mar. 2004, at 11. Lineups and photographic arrays have been administered blindly. For example, North Carolina requires blind administration of photo arrays and lineups. *Id.* (citing Letter from I. Beverly Lake Jr., Chief Justice, Sup.

E. Summary

The procedures employed by the police officers who conduct showups are the first line of defense against misidentification. As such, police officers should conduct showups only when necessitated by exigency and only in close temporal proximity to the witnessing event. In addition, police officers must avoid suggestive behaviors and should engage in proactive procedures that will likely reduce the inherent suggestiveness of a showup. Employment of these procedures by police officers will not only increase the likelihood of correct identifications being made pursuant to showups, but also will decrease the overall number of showup identifications conducted. In turn, this has the potential to decrease the total number of misidentifications made by eyewitnesses. Therefore, the above procedures should be mandatory, regardless of whether the mandatory nature of these procedures results from judicial rulings, legislative action, or internal police directives.

V. ADMISSIBILITY

The present court admissibility requirements for showup identifications are insufficient to prevent the admission of problematic showup identifications. This Part of the Article sets forth the present court admissibility requirements for showup identifications, as well as the problems with these requirements. This Part then discusses several recommended changes to the admissibility requirements for showup identifications.

A. Present Admissibility Requirements

The admissibility of showup identifications is determined pursuant to the Due Process Clause of the Fourteenth Amendment.[114] In 1977, in *Manson v. Brathwaite*, the United States Supreme Court stated

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Ct. of N.C., to Scott Perry et al., Director, Criminal Justice Training & Standards, N.C. Dep't. of Justice (Oct. 9, 2003)). New Jersey has also implemented blind administration procedures. *Id.* (citing Letter from John J. Farmer, Jr., N.J. Att'y Gen., to All County Prosecutors et al., at 1–2 (Apr. 18, 2001), *available at* http://www.state.nj.us/lps/dcj/agguide/photoid.pdf).

Although blindly administered showups would likely reduce the number of showup misidentifications, as the possibility for inadvertent suggestion on the part of the police officer administering the showup would be drastically limited, blindly administered showups may prove impractical because at a showup, unlike at a lineup or a photographic array, only one suspect is presented to the eyewitness for identification purposes. Thus, it may be difficult for the officer administering the showup not to know the identity of the person targeted.

In addition, implementing blind administration of any identification procedure may also prove more difficult in smaller police departments with few investigators. *See* Klobuchar, Steblay & Caligiuri, *supra* note 42, at 406–07.

114. *See* Stovall v. Denno, 388 U.S. 293, 302 (1967).

that due process "permits the admission of . . . confrontation evidence [such as a showup identification] if, despite the suggestive aspect, the out-of-court identification possesses certain features of reliability."[115] Hence, a court must examine the totality of the circumstances such that "if the challenged identification is reliable [regardless of whether the procedures used were unnecessarily suggestive], then testimony as to it and any identification in its wake is admissible."[116] Thus, the *Manson* Court rejected the idea that due process[117] requires "exclusion of the out-of-court identification evidence, without regard to reliability, whenever it has been obtained through unnecessarily suggestive confrontation procedures"[118] because "a suggestive preindictment identification does not in itself intrude upon a constitutionally protected interest."[119] The *Manson* Court reasoned that its totality of the circumstances approach, with reliability as the admissibility "linchpin,"[120] best serves three important interests that must be taken into consideration: (1) preventing juries from hearing "eyewitness testimony unless that evidence has aspects of reliability;"[121] (2) deterring police officers from engaging in unnecessarily suggestive procedures; and (3) administering justice, which includes preventing the guilty from going free.[122]

Hence, *Manson* set forth a two-pronged analysis to determine the admissibility of showup identifications.[123] The first prong requires a court to determine whether the identification procedure was unneces-

115. Manson v. Brathwaite, 432 U.S. 98, 110 (1977).

116. *Id.* at n.10.

117. It is noteworthy that the *Manson* court explained that the standard required by the Due Process Clause of the Fourteenth Amendment is "fairness." *Id.* at 113.

118. *Id.* at 110.

119. *Id.* at 113 n.13.

120. *Id.* at 114.

121. *Id.* at 112

122. *Id.* at 112–13.

123. *See* Wilson v. Mitchell, 250 F.3d 388, 397 (6th Cir. 2001) (detailing a two-pronged suggestiveness and reliability analysis); United States v. Woodward, 2000 U.S. App. LEXIS 18006, at *5 (1st Cir. July 25, 2000) (explaining that to determine the admissibility of an out-of-court identification, a court must engage in a two-pronged inquiry: (1) determine whether the procedure was unnecessarily suggestive; and (2) if unnecessarily suggestive, "under the totality of the circumstances, [was] the identification itself [] reliable"); Nauton v. Newland, 1998 U.S. App. LEXIS 8488, at *6 (9th Cir. Apr. 29, 1998) (explaining that even if a pretrial identification procedure is unnecessarily suggestive, the court must examine whether the identification, nevertheless, was reliable); State v. Herrera, 902 A.2d 177, 183 (N.J. 2006) (The United States Supreme Court has set forth a two-pronged analysis which "requires the court first to ascertain whether the identification procedure was impermissibly suggestive, and, if so, whether the unnecessarily suggestive procedure was nevertheless reliable. The totality of the circumstances must be considered in weighing the suggestive nature of the identification against the reliability of the identification.").

sarily suggestive.[124] Only if a court finds that the identification procedure was unnecessarily suggestive does a court examine the second prong, which requires a determination of whether, despite the use of unnecessarily suggestive procedures, the identification was nevertheless reliable. In determining reliability, the *Manson* Court stated that the following factors should be considered:

> the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of [the witness's] prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation.[125]

Only if the reviewing court finds that the showup was both unnecessarily suggestive *and* unreliable will a showup be deemed inadmissible.[126]

Some of the factors courts have considered when determining whether a showup procedure was unnecessarily suggestive are: (1) whether the police made the defendant wear clothing similar to the clothing worn by the criminal at the time of the crime; (2) whether the defendant was of a race that differed from the race of the police officers around him; (3) whether the police officers conducting the showup made the defendant say some of the words said by the criminal at the time of the crime; (4) whether statements made by the police officers or prosecutors suggested to the eyewitness that the police officers or prosecutors believed the defendant committed the crime; (5) whether the defendant was in handcuffs or in a jail cell at the time of the showup; and (6) whether the police officers conducting the showup presented the defendant simultaneously to multiple eyewitnesses.[127]

Unfortunately, the courts have not been uniform in their determinations as to what constitutes unnecessarily suggestive identification procedures.[128] For example, in *Smith v. Coiner*, the United States Court of Appeals for the Fourth Circuit held that a showup identification at which the defendant was handcuffed and escorted by two police

124. With regard to suggestiveness, one court has explained that "one-on-one showups are inherently suggestive . . . because the victim can only choose from one person, and, generally, that person is in police custody." *Herrera*, 902 A.2d at 183. Nevertheless, the court further explained that the mere fact that the identification occurs at a showup does not mean that the identification is automatically so impermissibly suggestive as to require moving immediately to the second reliability step. *Id.*

125. *Id.* at 185 (citing *Manson*, 432 U.S. at 114).

126. A reviewing court must consider the totality of the circumstances when weighing the suggestiveness of the identification against the reliability of the identification. *Manson*, 432 U.S. at 114.

127. *See* Ferdinand S. Tinio, Annotation, *Admissibility of Evidence of Showup Identification as Affected by Allegedly Suggestive Showup Procedures*, 39 A.L.R. 3D 791 (2007).

128. *Id.*; *see also* Rosenberg, *supra* note 105, at 281 (explaining that "[t]he inferior federal courts and the state courts have been inconsistent about the elemental question of what circumstances rendered a pretrial procedure suggestive").

officers, despite the fact that a lineup was feasible, was unnecessarily suggestive.[129] Similarly, in *Clark v. Caspari*, the United States Court of Appeals for the Eighth Circuit held that a showup involving two black suspects in handcuffs, surrounded by white police officers on a city street, was unnecessarily suggestive.[130] However, in *United States v. Walker*, the United States Court of Appeals for the Eleventh Circuit held that a showup involving a defendant in handcuffs, surrounded by police officers, was not unnecessarily suggestive.[131] And, in *State v. Wilson*, the Appellate Division of New Jersey found that a witness's identification of a defendant seated and handcuffed in the back of a police vehicle was not per se unnecessarily suggestive.[132]

Another example of the lack of uniformity among the courts pertains to how courts have viewed statements made by a police officer to an eyewitness that convey the officer's belief that the correct person is in custody. For example, in *United States* ex rel. *Richardson v. Rundle*,[133] the Federal District Court of Pennsylvania held that a police officer's statement to the eyewitness, "I think we've got the man," did not render the showup unnecessarily suggestive. Yet, in *State v. Pettway*, a Connecticut court held that the following statement by a police officer to the eyewitness was unnecessarily suggestive: "[W]e caught the person, we're going to have you identify him."[134] Hence, what constitutes an unnecessarily suggestive showup identification is unclear. This is due, at least in part, to the fact that the question of whether a showup procedure is unnecessarily suggestive is a highly subjective, fact-sensitive determination. However, the uncertainty is largely due to the fact that the United States Supreme Court has failed to define the term "unnecessarily suggestive."[135]

The five reliability factors discussed by the *Manson* Court are also highly subjective and fact-sensitive; thus, there has not been uniformity among the courts as to what satisfies each of the five reliability factors such that an identification is deemed admissible.[136] Courts

129. Smith v. Coiner, 473 F.2d 877, 881 (4th Cir. 1973), *cert. denied,* 414 U.S. 115 (1973).

130. Clark v. Caspari, 274 F.3d 507, 511 (8th Cir. 2001).

131. United States v. Walker, 201 F. App'x 737, 741 (11th Cir. 2006).

132. State v. Wilson, 827 A.2d 1143, 1147–48 (N.J. Super. Ct. App. Div. 2003).

133. United States *ex rel.* Richardson v. Rundle, 382 F. Supp. 633, 636, 641 (1974), *aff'd* without opinion, at 511 F.2d 1396 (3d Cir. 1975), *cert. denied,* at 422 U.S. 1047 (1975).

134. State v. Pettway, 664 A.2d 1125, 1129 (Conn. App. Ct. 1995), *cert. denied* at 665 A.2d 908 (Conn. 1995). Similarly, in State v. Davis, 767 A.2d 137, 143 (2001), the Connecticut Appellate Court held that the police officer's statement to the victim at the showup, "[w]e got him, we got him[ ] . . . We had two boys. You got to tell which one, who it is," rendered the showup procedure unnecessarily suggestive.

135. Rosenberg, *supra* note 105, at 283.

136. For example, with respect to the fifth factor, the delay between the identification and the witnessing event, courts differ greatly in how tolerant they are of delay.

have, however, been uniform in generally concluding that an identification is reliable after evaluating the five reliability factors articulated in *Manson*.[137]

Moreover, as discussed earlier, a showup identification is admissible even if counsel was not present at the identification unless the showup was conducted at or after "the time that adversary judicial proceedings [were] initiated."[138] However, as noted above, because the vast majority of showup identifications occur *before* adversary judicial proceedings begin, the right to counsel does not extend to most showup identifications.[139]

Thus, to summarize, a showup identification is admissible—even if the procedures employed by the police officers when conducting the showup were unnecessarily suggestive—so long as the court finds that the showup identification was reliable. In addition, a showup identification generally is admissible even if counsel was not present at the showup identification.

B. Problems with the Present Admissibility Requirements

In light of the reprehensible number of individuals wrongly identified pursuant to showups and then subsequently convicted of crimes they did not commit, it is clear that the current admissibility requirements are not protecting defendants sufficiently. This is largely due to the fact that the *Manson* admissibility test permits a court to admit an identification conducted pursuant to the most unnecessarily suggestive procedures, so long as an examination of the five reliability factors articulated by the Court weighs in favor of finding the identification reliable. Yet, as commentators have noted, a court cannot really know whether an identification is reliable if suggestive procedures were used, because even when an eyewitness (1) had the opportunity to view the criminal at the time of the crime, (2) was able to pay careful attention at the time of the crime, (3) gave an accurate

E.g., State v. Hoskins, 14 P.3d 997, 1008 (Ariz. 2000) (upholding the reliability of a showup identification despite the fact that it occurred approximately twelve hours after the witnessing event); State v. Grice, 537 A.2d 683, 685–86 & n.1 (N.J. 1988) (upholding a showup identification made by a victim approximately three hours after the crime was committed).

137. Rosenberg, *supra* note 105, at 284. Notably, most courts have applied the five *Manson* factors exclusively in making reliability determinations, despite the Supreme Court's indication that the five factors were not meant to bar consideration of other indicia of reliability. *Id.*; *see, e.g.*, McFadden v. Cabana, 851 F.2d 784, 790 (5th Cir. 1988); Cooley v. Lockhart, 839 F.2d 431, 431–32 (8th Cir. 1988); Thigpen v. Cory, 804 F.2d 893, 895–97 (6th Cir. 1986); Dickerson v. Fogg, 692 F.2d 238, 244–47 (2d Cir. 1982); Solomon v. Smith, 645 F.2d 1179, 1185–87 (2d Cir. 1981).

138. Kirby v. Illinois, 406 U.S. 682, 690 (1972).

139. *See supra* note 53.

prior description, (4) demonstrated certainty when identifying the defendant, and (5) had experienced minimal delay between the time of the crime and the time of the identification, suggestive procedures can have a profound effect on the eyewitness.[140] Even subtle postidentification events can influence a witness's confidence in her identification.[141] According to psychologists Cutler and Penrod:

> Eyewitness identifications take place in a social context in which the eyewitness's performance can be influenced by her expectations and inferences, which in turn can be influenced by the verbal and nonverbal behaviors of investigators, the structure of the identification test, and the environment in which the identification test is conducted.[142]

Hence, for example, a cooperative witness, who observes the investigators' zeal, who hears the investigators' comments, and who notes that the investigators went through the trouble of arranging the showup, might feel pressure to contribute by making a positive identification.[143] Therefore, as noted by the New Hampshire Supreme Court, "[c]onsidering the complexity of the human mind and the subtle effects of suggestive procedures upon it, a determination that an identification was unaffected by such procedures must itself be open to serious question."[144]

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140. *See* State v. Dubose, 699 N.W.2d 582, 592 (2005) ("Because a witness can be influenced by the suggestive procedure itself, a court cannot know exactly how reliable the identification would have been without the suggestiveness."); Keith A. Findley, *Learning from Our Mistakes: A Criminal Justice Commission to Study Wrongful Convictions*, 38 CAL. W. L. REV. 333, 334 n.2 (2002) (explaining that because reliability factors "are so affected by suggestiveness, they provide a poor basis upon which to evaluate whether an identification is sufficiently reliable to overcome that very suggestiveness"); Rosenberg, *supra* note 105, at 291 (explaining that

> [u]nnecessarily suggestive pretrial identification procedures differ from most other improper law enforcement activities because they do not further any valid law enforcement interest. Although a violation of a suspect's fourth of fifth amendment rights—for example, a warrantless search or an interrogation without a lawyer present—is plainly wrong, it might at least further the valid law enforcement objective of collecting relevant evidence. By contrast, an unnecessarily suggestive identification procedure simply creates unreliable evidence where reliable evidence could have been gathered. It is not a case where good ends justify bad means—the end result of an unnecessarily suggestive procedure is worthless precisely because of the means used.)

This is especially true given that "it is extremely difficult, if not impossible, for courts to distinguish between identifications that were reliable and identifications that were unreliable." *Dubose*, 699 N.W.2d at 592.

141. Judges, *supra* note 109, at 264 ("Research also shows that witnesses's confidence in the accuracy of their identification can also be affected by post-identification events.").

142. *Id.* (citing BRIAN L. CUTLER & STEVEN D. PENROD, MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW 113 (Cambridge Univ. Press 1995)).

143. CUTLER & PENROD, *supra* note 142, at 114.

144. State v. Leclair, 385 A.2d 831, 833 (N.H. 1978).

Furthermore, the five reliability factors articulated by the Supreme Court in *Manson* "are not valid predictors of the reliability of eyewitness testimony" because they are based upon incorrect assumptions.[145] One commentator has explained that "[p]sychological studies demonstrate that each of the factors identified by the Court, and subsequently applied by the inferior federal courts and state courts, is either unsupported as a scientific matter or dangerously incomplete."[146]

In delineating the first factor, eyewitness certainty, the Supreme Court likely succumbed to the fallacious belief that the more certain an eyewitness is about an identification, the more reliable the identification is likely to be. However, scientific studies have repeatedly demonstrated that there is no significant correlation between an eyewitness's level of certainty in an identification and the accuracy of that identification.[147] With regard to the second factor, "the [a]ccuracy of the [e]yewitness's prior description,"[148] the Supreme Court must have presumed that if an eyewitness's prior description of a face is similar to the face later identified, the identification is likely reliable. However, scientific evidence indicates that there is no "appreciable relationship between a person's prior description of a face and the person's accuracy in identifying the face"[149] because "although faces easily evoke verbal labels as word associates, ease of labeling [is] not related to accuracy of facial recognition."[150]

Although eyewitness attention during the witnessing event, the eyewitness's opportunity to view the criminal during the witnessing event, and the delay between the witnessing event and the identification (the third, fourth, and fifth reliability factors, respectively) all

145. Rosenberg, *supra* note 105, at 275.

146. *Id.* at 276.

147. *Id.* at 276–77 (citing Brian L. Cutler, Steven D. Penrod & Todd K. Martens, *The Reliability of Eyewitness Identification: The Role of System and Estimator Variables*, 11 LAW & HUM. BEHAV. 233, 234 (1987)); *see* Kenneth A. Deffenbacher, *Eyewitness Accuracy and Confidence: Can We Infer Anything About Their Relationship?*, 4 LAW & HUM. BEHAV. 243, 245–48, 258 (1980); Gary L. Wells & Donna M. Murray, *Eyewitness Confidence, in* EYEWITNESS TESTIMONY: PSYCHOLOGICAL PERSPECTIVES 155 (Gary L. Wells & Elizabeth F. Loftus eds., Cambridge Univ. Press 1984).

148. Rosenberg, *supra* note 105, at 277.

149. *Id.* at 277; *see* Alvin G. Goldstein, Karen S. Johnson & June Chance, *Does Fluency of Face Description Imply Superior Face Recognition?*, 13 BULL. PSYCHONOMIC SOC'Y 15, 15–18 (1979); Thomas H. Howells, *A Study of Ability to Recognize Faces*, 33 J. ABNORMAL & SOC. PSYCHOL. 124, 125–27 (1938); Gary L. Wells & Donna M. Murray, *What Can Psychology Say About the* Neil v. Biggers *Criteria for Judging Eyewitness Accuracy?*, 68 J. APPLIED PSYCHOL. 347, 354–55 (1983).

150. A. DANIEL YARMEY, THE PSYCHOLOGY OF EYEWITNESS TESTIMONY 138 (The Free Press 1979); *see also* Rosenberg, *supra* note 105, at 277 (noting that scientific evidence does not support a relationship between prior descriptions and accuracy).

have important implications for reliability, these factors have been misunderstood and misapplied by the courts.[151] With regard to the third factor, many courts believe that a person in danger is likely to be more attentive than a person not in danger.[152] However, science has dispelled such a notion and, in fact, has found the contrary to be true: Eyewitness identifications made by people who are in danger at the time of the initial observation of the criminal are less reliable than identifications made by people whose initial observations of the criminal are made under calmer circumstances.[153] With regard to the fourth factor, when evaluating a witness's opportunity to view the criminal, courts consistently fail to consider that science has demonstrated that the vast majority of people overestimate the duration of the witnessing event.[154] And, with regard to the fifth reliability factor, many courts fail to consider the fact that a witness's memory deteriorates drastically immediately after the initial observation of the criminal and then deteriorates minimally with subsequent delay.[155] As such, utilization of the five reliability factors is problematic.

Moreover, admission of an unnecessarily suggestive identification, so long as the identification is deemed reliable, and regardless of the criteria used to determine reliability, is not constitutionally sound.[156] First, it is not sound because "[t]o a person whose fate depends on the accuracy of an identification, it is fundamentally unfair for the police to unnecessarily employ a technique that maximizes the potential for error."[157] Second, as Justice Marshall eloquently explained in his dissent in *Manson*:

> [The test articulated by the majority in *Manson*] suggests a reinterpretation of the concept of due process of law in criminal cases. The decision suggests that due process violations in identification procedures may not be measured by

151. *See* Rosenberg, *supra* note 105, at 277–79.

152. *Id.* at 278 (citing Moore v. Illinois, 434 U.S. 220, 234–35 (1977) (Blackmun, J., concurring) ("One need only observe another person's face for 10 seconds by the clock . . . . To the resisting woman, the 10 to 15 seconds would seem endless.")).

153. *Id.* at 278 (citing Hadyn D. Ellis, *Practical Aspects of Face Memory*, *in* EYEWITNESS TESTIMONY: PSYCHOLOGICAL PERSPECTIVES 12, 20 (Gary L. Wells & Elizabeth F. Loftus eds., Cambridge Univ. Press 1984)).

154. *Id.* at 278.

155. *Id.* at 279 (citing LOFTUS, *supra* note 58, at 53); JOHN W. SHEPHERD ET AL., *supra* note 100; Samuel R. Gross, *supra* note 100, at 399.

156. Rosenberg, *supra* note 105, at 276 ("Since the Supreme Court has held that the sole value underlying the right [to due process] is reliability, the critically important interest of procedural fairness in pretrial identification procedures is unprotected.").

157. State v. Herrera, 902 A.2d 177, 198 (N.J. 2006) (Albin, J., dissenting). The Supreme Court has noted that "[a] major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification." United States v. Wade, 388 U.S. 218, 228 (1967).

> whether the government employed procedures violating standards of fundamental fairness. By relying on the probable accuracy of a challenged identification, instead of the necessity for its use, the Court seems to be ascertaining whether the defendant was probably guilty. Until today, I had thought that "Equal justice under law" meant that the existence of constitutional violations did not depend on the race, sex, religion, nationality, or likely guilt of the accused. The Due Process Clause requires adherence to the same high standard of fundamental fairness in dealing with every criminal defendant, whatever his personal characteristics and irrespective of the strength of the State's case against him. Strong evidence that the defendant is guilty should be relevant only to the determination whether an error of constitutional magnitude was nevertheless harmless beyond a reasonable doubt . . . . By importing the question of guilt into the initial determination of whether there was a constitutional violation, the apparent effect of the Court's decision is to undermine the protection afforded by the Due Process Clause.[158]

Hence, permitting a court to admit a showup identification at which the police employed unnecessarily suggestive procedures, merely if the identification is adjudged reliable, is constitutionally infirm.[159]

Another problem with the present admissibility requirements for showup identifications is that showups conducted in the absence of exigency,[160] as well as showups that are not conducted in close temporal proximity to the time the eyewitness initially viewed the criminal,[161] are admissible. Permitting the admission of showup identifications conducted absent exigency is problematic in that police officers have little incentive to use more reliable methods of identification, such as a lineup, because the showup identification will not be suppressed even though a more reliable method of identification could have been used. In addition, permitting the admission of showup identifications that are not made in close temporal proximity to the witnessing event is problematic as the likelihood of misidentification becomes much greater for a showup relative to a lineup as time passes, yet, absent the threat of suppression, police officers have little incentive to use a lineup.

Furthermore, it is not constitutionally sound to permit the admission of showup identifications when exigency did not necessitate the use of a showup and the showup was not made in close temporal proximity to the time the eyewitness initially viewed the criminal. The standard required by the Due Process Clause is that of fairness.[162]

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158. Manson v. Brathwaite, 432 U.S. 98, 128 (1977) (Marshall, J., dissenting).

159. One commentator described the present due process test as "nothing more than a superficial inquiry into the competency of the witness to testify: Did the eyewitness observe enough at the scene of the crime so that the trial judge should permit his testimony?" Charles A. Pulaski, Neil v. Biggers*: The Supreme Court Dismantles the* Wade *Trilogy's Due Process Protection*, 26 STAN. L. REV. 1097, 1113 (1974).

160. *See* discussion of exigency *supra* Part IV.A.

161. *See* discussion of temporal closeness *supra* Part IV.B.

162. United States v. Lovasco, 431 U.S. 783, 790 (1977); Rochin v. California, 342 U.S. 165, 169–72 (1952); *see* Rosenberg, *supra* note 105, at 290 ("[T]he Court has con-

When a person's "fate depends on the accuracy of an identification",[163] fairness mandates that police officers employ procedures that minimize "the potential for error."[164] Thus, the fairness requirements of the Due Process Clause are violated and showups should be suppressed where they are not mandated by exigency, as well as where they are not done in close temporal proximity to the eyewitness's initial viewing of the criminal.

The final problem with the present admissibility requirements is that a showup identification is generally admissible even if counsel was not present at the showup. Yet, the same evils that the Supreme Court hoped to alleviate by extending the right to counsel at identifications conducted "at or after the time that adversary judicial proceedings have been initiated," are present and problematic at showup identifications conducted before "adversary judicial proceedings have been initiated."[165] For example, one of the reasons the Supreme Court gave for requiring the presence of counsel at identifications conducted at or after the initiation of adversary judicial proceedings is that "the confrontation compelled by the State between the accused and the victim or witnesses to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial."[166] Yet, identifications conducted *before* the initiation of judicial proceedings are just as "peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial."[167] And, like at an identification conducted at or after the initiation of judicial proceedings, counsel at a showup identification conducted before the initiation of judicial proceedings would be "alert for conditions prejudicial to the suspect" that the suspect is unlikely or unable to notice.[168]

Additionally, the United States Constitution supports the extension of the Sixth Amendment right to counsel to a showup identification conducted prior to the initiation of judicial proceedings. The Sixth Amendment reads, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."[169] In *Kirby v. Illinois*,[170] the United States Supreme Court wrongly held that the Sixth Amendment right to counsel "attaches

sistently assigned to the due process clause in other circumstances the role of serving as a guarantor of standards of fairness and decency.").

163. State v. Herrera, 902 A.2d 177, 198 (N.J. 2006) (Albin, J., dissenting).
164. *Id.*
165. Kirby v. Illinois, 406 U.S. 682, 688 (1972).
166. United States v. Wade, 388 U.S. 218, 228 (1967).
167. *Id.*
168. *Id.* at 230.
169. U.S. CONST. amend. VI
170. 406 U.S. at 682.

only at or after the time adversary judicial proceedings have been initiated,"[171] which occurs by way of "formal charge, preliminary hearing, indictment, information, or arraignment."[172] In truth, the Sixth Amendment does not support limiting the right to counsel at identifications to only those identifications that occur at or after the time adversary judicial proceedings have been initiated. The United States Supreme Court explained in *Wade* that "[t]he plain wording of [the Sixth Amendment] encompasses counsel's assistance whenever necessary to assure a meaningful 'defence'."[173] And, as discussed earlier, counsel's assistance is necessary at any identification procedure, regardless of the stage in the judicial process at which it is conducted, to assure a meaningful defense.[174] As such, a correct interpretation of the Sixth Amendment requires that the right to counsel extend to all identifications, including showups, regardless of whether they are made at or after the initiation of judicial proceedings.

C. Suggested Admissibility Requirements

Given the problems with the present admissibility standards governing showup identifications, several changes are necessary.

1. Unnecessarily Suggestive

Given the fairness implications of due process and the questionable soundness of the *Manson* reliability factors, as well as the difficulty in discerning the reliability of showup identifications when made pursuant to unnecessarily suggestive procedures, the Supreme Court should re-examine the showup identification admissibility test articulated in *Manson*. The Court should hold that a showup identification is admissible only if the procedures employed by the police officers who conducted the showup identification were not unnecessarily suggestive. In addition, given that the courts have not been uniform in their determinations as to what constitutes unnecessarily suggestive identification procedures, the Supreme Court should provide guidance as to what constitutes an unnecessarily suggestive identification procedure to the extent possible given the fact-sensitive, subjective nature of such a determination. For example, one commentator has suggested that the following definition of suggestiveness be considered:

> [A] pretrial identification is suggestive if and only if the witness is in some way apprised of which person in the pretrial identification procedure the police believe to be the perpetrator. If the witness is "tipped off" in this way, then the witness's selection of a person from the pretrial identification procedure would be the result not simply of the process of recognition, but of the

171. *Id.* at 688.
172. *Id.* at 689.
173. *Wade*, 388 U.S. at 225.
174. *Id.* at 228–32.

> witness's inference about the police's behavior. In other words, the witness may think not only that, "I believe that X is the assailant because I recognize him," which is a perfectly acceptable chain of thinking, but might also think, "I believe that X is the assailant because I recognize him and the police think that he is the assailant," which is plainly an improper method of identification for the witness to employ.[175]

Additionally, the highest state courts, independent of any action taken by the United States Supreme Court, should hold, pursuant to their own state constitutions, that a showup identification is admissible only if the procedures employed by the police officers who conducted the showup identification were not unnecessarily suggestive. In fact, at least one state court has already held that unnecessarily suggestive showup procedures will preclude the admissibility of an identification, regardless of whether the identification made is deemed reliable.[176] In *Commonwealth v. Johnson*, the Massachusetts Supreme Judicial Court held that the Massachusetts Constitution requires the exclusion of any unnecessarily suggestive identification, even if the identification is reliable.[177]

Excluding unnecessarily suggestive identifications will reduce the number of problematic eyewitness identifications made pursuant to showups that are admitted in courts and subsequently utilized by juries. Moreover, such a change will better serve the three important interests articulated by the *Manson* Court in justifying its totality of the circumstances approach to admissibility: (1) preventing juries from hearing "eyewitness testimony unless the evidence has aspects of reliability;" (2) deterring police officers from engaging in unnecessarily suggestive procedures; and (3) administering justice.[178] First, because a court cannot discern accurately whether an identification is reliable if unnecessarily suggestive procedures were used, and because the *Manson* reliability factors are not dependable indicators of reliability, suppression of showup identifications conducted pursuant to unnecessarily suggestive procedures better prevents juries from hearing "eyewitness testimony unless that evidence has aspects of reliability" than does admission of such showup identifications. Second, as even the *Manson* Court admitted, police officers will be more deterred from engaging in unnecessarily suggestive procedures if showup identifications made pursuant to unnecessarily suggestive procedures are *per se* inadmissible than if a court determination of reliability can salvage an identification's admissibility. Third, justice will be better served by suppressing showup identification evidence obtained pursuant to unnecessarily suggestive procedures. The *Manson* Court held that the administration of justice is better served by its

175. Rosenberg, *supra* note 105, at 298–99 (emphasis omitted).
176. *See* Commonwealth v. Johnson, 650 N.E.2d 1257, 1261 (Mass. 1995).
177. *Id.* at 1261.
178. Manson v. Brathwaite, 432 U.S. 98, 112–13 (1977).

totality of the circumstances test because a per se prohibition of any identification made pursuant to unnecessarily suggestive procedures "denies the trier reliable evidence," which "may result, on occasion, in the guilty going free."[179] Although some guilty individuals may go free, justice will be better served by prohibiting the admission of identifications made pursuant to unnecessarily suggestive procedures because far fewer innocent individuals will be wrongly incarcerated, which in turn will also result in the police continuing to pursue the "real outlaw[s]."[180]

In addition, admissibility of identification evidence should never turn on the reliability of the evidence because, as noted by Justice Marshall in his *Manson* dissent, although "other exclusionary rules have been criticized for preventing jury consideration of relevant and usually reliable evidence in order to serve interests unrelated to guilt or innocence, such as discouraging illegal searches or denial of counsel,"[181] "[s]uggestively obtained eyewitness testimony is excluded, in contrast, precisely because of its unreliability and concomitant irrelevance. Its exclusion both protects the integrity of the truth-seeking function of the trial and discourages police use of needlessly inaccurate and ineffective investigatory methods."[182]

2. *Exigency and Close Temporal Proximity*

The admission of showup identifications that are conducted in the absence of exigency, as well as those that are not conducted in close temporal proximity to the time the eyewitness initially viewed the criminal, is problematic, as well as unconstitutional. Thus, the United States Supreme Court should hold that a showup identification is admissible only if utilization of a showup identification was necessitated by exigency[183] *and* only if the showup identification was conducted in close temporal proximity to the time the eyewitness initially viewed the criminal. Moreover, regardless of a future United States Supreme Court holding to that effect, the highest court of every state should hold, pursuant to their own state constitutions, that a showup identification is admissible only if it was necessitated by exigency and conducted in close temporal proximity to the time the eyewitness initially viewed the criminal.[184]

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179. *Id.* at 112.
180. *Id.* at 127 (Marshall, J., dissenting).
181. *Id.*
182. *Id.*
183. Should the Supreme Court refuse to hold that showup identifications that are conducted absent exigency are inadmissible pursuant to the Due Process Clause, the Supreme Court should hold that showup identifications that are conducted absent exigency are unnecessarily suggestive, and thus, inadmissible.
184. Some state courts have, in fact, held that showups conducted absent exigent circumstances are inadmissible. *See* People v. Riley, 517 N.E.2d 520, 524 (N.Y.

Suppression of showup identifications that were not necessitated by exigency and that were not conducted in close temporal proximity to the time the eyewitness initially viewed the criminal will better serve the three interests articulated by the *Manson* Court in justifying its totality of the circumstances approach to admissibility.[185] First, juries will be prevented, to a greater extent than under the current admissibility rules, from hearing "eyewitness testimony unless that evidence has aspects of reliability"[186] because by excluding non-exigent, delayed showup identifications, there will be a drastic reduction in the number of showups conducted by police officers and an associated drastic increase in the number of eyewitness identifications conducted pursuant to more reliable methods of identification, such as a lineup. This will likely result in a reduction in the number of showup misidentifications made and, thus, subsequently presented to juries. Furthermore, as discussed earlier, excluding showup identifications made after a delay will likely reduce the number of misidentifications made pursuant to showups, which in turn, will likely reduce trial presentation of eyewitness testimony that lacks "aspects of reliability."[187] Second, making admissibility of showup identifications contingent upon exigency and immediacy will more effectively deter police officers from engaging in unnecessarily suggestive procedures because the threat of exclusion will loom large. Third, the exclusion of non-exigent, delayed showup identifications will better serve justice because it is likely that fewer unreliable eyewitness identifications will be heard by juries and, thus, presumably far fewer individuals will be wrongly convicted by juries.

1987) (concluding that showup identifications are inadmissible in the absence of exigent circumstances); People v. Rachford, No. 2002SU17697, slip op. at 3–4 (N.Y. Dist. Ct. May 6, 2004) ("Showup identifications are permissible if exigent circumstances require immediate identification . . . . In other words, showups are permitted if there is some necessity to resort to the procedure."); State v. Dubose, 699 N.W.2d 582, 593–94 (Wis. 2005) ("[E]vidence obtained from an out-of-court showup is inherently suggestive and will not be admissible unless, based on the totality of the circumstances, the procedure was necessary. A showup will not be necessary, however, unless the police lacked probable cause to make an arrest or, as a result of other exigent circumstances, could not have conducted a lineup or photo array").

Also, many courts have stated, in dicta, that a showup identification, conducted absent exigent circumstances, should be inadmissible. *See* State v. Lawson, 959 P.2d 923, 927 (Kan. Ct. App. 1998) ("Absent exigent circumstances, the use of one person show-ups by law enforcement has been condemned."); People v. Smith, 487 N.Y.S.2d 210, 212 (N.Y. App. Div. 1985) ("In the absence of exigent circumstance . . . one-on-one viewings . . . are strongly disfavored."). However, the condemnation of showup identifications conducted absent exigent circumstances in dicta is not sufficient.

185. *Manson*, 432 U.S. at 112–13.

186. *Id.*

187. *Id.*

3. Presence of Counsel

The presence of counsel at all showup identifications, regardless of whether judicial proceedings have begun, is necessary to protect against those evils the Supreme Court hoped to abolish by requiring the presence of counsel at identifications conducted at or after the initiation of judicial proceedings. Moreover, the presence of counsel is necessitated by the Sixth Amendment. Accordingly, the United States Supreme Court and the highest state courts ought to hold that a showup identification is admissible only if counsel was present at the identification.

Such a change will also more effectively serve the three important interests articulated by the *Manson* Court in support of its totality of the circumstances approach to admissibility.[188] First, the presence of counsel will prevent juries from hearing "eyewitness testimony unless that evidence has aspects of reliability"[189] to a greater extent than do the present admissibility rules. An attorney is more likely "alert [to] conditions prejudicial to [a] suspect,"[190] and thus, can object prior to an eyewitness making an identification tainted by suggestiveness that will likely be unreliable. Second, the presence of counsel will deter police officers from engaging in unnecessarily suggestive procedures to a greater extent than the present admissibility requirements because an attorney can object to the utilization of unnecessarily suggestive procedures. Moreover, even if the officers utilize unnecessarily suggestive procedures, an attorney, having observed the utilization of such unnecessarily suggestive procedures, will be better able to effectively argue for the exclusion of the identification in court. Further, should the identification be admitted, an attorney who observed an identification will be better able to provide a meaningful defense for a client through effective cross-examination of the eyewitness.

Third, the number of problematic eyewitness identifications either admitted in court or accepted by the jury will be minimized and justice will be better served by having counsel present at all showup identifications because counsel has the ability to (1) object to unnecessarily suggestive procedures at the time of the identification, (2) adequately reconstruct the unnecessarily suggestive aspects of the procedures for the court when arguing for the exclusion of the identification, and (3)

188. *Id.* It is noteworthy that, as the *Wade* Court explained,

> it is a matter of common experience that, once a witness has picked out the accused at the line-up, he is not likely to go back on his word later on, so that in practice the issue of identity may (in the absence of other relevant evidence) for all practical purposes be determined there and then, before the trial.

U.S. v. Wade, 388 U.S. 218, 229 (1967) (quoting Glanville Williams & H. A. Hammelmann, *Identification Parades—I*, 1963 CRIM. L. REV. 479, 482).

189. *Manson*, 432 U.S. at 112.

190. *Wade*, 388 U.S. at 230–31.

effectively cross-examine an eyewitness in court regarding an admitted, yet suggestive identification. Thus, juries will be less likely to convict innocent people on the basis of showup misidentifications.[191]

In addition, it is important to note that showup identifications, on average, have more characteristics of a "critical stage," at which the Sixth Amendment right to counsel attaches, than does a photographic array; thus, unlike the photographic array, the right to counsel ought to attach to showups. The Third Circuit has explained that a photographic identification differs from a live identification where a defendant "may be forced to act, speak or dress in a suggestive way, where the possibilities for suggestion are multiplied, where the ability to reconstruct the events is minimized, and where the effect of a positive identification is likely to be permanent."[192] Moreover, the Third Circuit aptly noted that the "viewing of immobile photographs [is] easily reconstructible, far less subject to subtle suggestion, and far less indelible in its effect when the witness is later brought face to face with the accused."[193] Thus, the United States Supreme Court and the highest state courts ought to hold that showup identifications, unlike photographic arrays, are "critical stages" to which the Sixth Amendment right to counsel attaches. Thus, failure to provide counsel at a showup should result in the showup identification being inadmissible.

D. Summary

The present admissibility requirements for showup identifications are too lenient to prevent problematic showup identifications from be-

191. Unfortunately, it would be impracticable to require the presence of *the* counsel that will represent the defendant through the end of the defendant's criminal proceedings at a showup identification of the defendant. However, the Sixth Amendment does not mandate as much; rather, the Sixth Amendment merely requires the presence of counsel. U.S. CONST. amend. VI. To comply, the office of the public defender should provide an attorney to any person who is the target of a showup identification, regardless of whether that attorney will represent that individual in the future. If the attorney present at the showup identification does not represent the defendant through the completion of all judicial proceedings, the attorney who does subsequently represent the defendant will not be able to recreate the identification procedures for the court or cross-examine an eyewitness as effectively as had he been present at the identification. However, the notes taken by the attorney present at the showup, as well as the ability to communicate with the attorney present at the showup, will prove far more useful to the defendant's subsequent attorney than any description of the identification procedures provided by the defendant.

In addition, if the target of a showup identification can immediately contact a private attorney, and his attorney is able to observe the showup identification at that time, then police officers should not conduct the showup identification until the target's attorney is present.

192. United States v. Ash, 413 U.S. 300, 324 (1973) (quoting United States *ex rel.* Reed v. Anderson, 461 F.2d 739, 745 (3d Cir. 1972)).

193. *Id.*

ing presented to juries. As such, comprehensive changes to the admissibility rules are warranted. It is not enough to merely prohibit the admission in court of showup identifications conducted absent exigency. Nor is it enough to merely prohibit the admission in court of showup identifications conducted absent the presence of counsel. Rather, it is necessary to make inadmissible any unnecessarily suggestive showup identification, any showup identification conducted absent exigency, any showup identification that was not conducted in close temporal proximity to the witnessing event, and any showup identification conducted absent the presence of counsel.

Such comprehensive changes to the admissibility requirements for showup identifications will drastically reduce the number of showup identifications conducted, which in turn will increase the number of identifications conducted pursuant to more reliable methods, such as a lineup. Moreover, such comprehensive changes will also drastically reduce police usage of unnecessarily suggestive identification procedures when conducting showups, as well as the number of problematic eyewitness identifications presented to juries. Also, these changes will result in counsel being better able to defend against possible misidentifications at the initial showup, to reconstruct any suggestive procedures used by the police officers conducting the showup for the court, and to provide an effective defense through effective cross-examination of eyewitnesses.

Thus, because changes to the admissibility requirements for showup identifications are warranted under the United States Constitution and all relevant state constitutions, the United States Supreme Court and the highest court of every state ought to revisit and revise their admissibility requirements for showup identifications in conformance with the above-discussed suggestions.[194]

194. The United States Supreme Court, and the highest court in every state, should not hold that all identifications made pursuant to showups are inadmissible. Although such a rule would eliminate problematic showup identifications from coming before a jury, and would ensure that all eyewitness identifications are made pursuant to more reliable identification methods, such a rigid rule is problematic in that it does not give police officers the flexibility to use showups when exigent circumstances make use of other identification procedures impractical, such as when the police need an immediate identification because a victim's life is at risk. Moreover, such a rigid rule is unnecessary so long as courts employ the heightened admissibility requirements suggested in this Article. Thus, a complete ban on the admissibility of identifications made pursuant to showups is not the proper way to ensure that fewer problematic eyewitness identifications come before juries.

VI. EXPERT TESTIMONY

The vast majority of courts have refused to admit expert testimony pertaining to the reliability of eyewitness identifications.[195] Yet, in order to reduce juror reliance on problematic eyewitness identifications, courts generally should admit expert testimony pertaining to eyewitness identifications (in addition to improving police procedures for conducting showups and improving admissibility requirements for showup identifications).

Many commentators have asserted that courts should admit expert testimony regarding eyewitness identifications in general,[196] because many jurors have misconceptions regarding the memory process, and these misconceptions have a profound influence on the credibility jurors assign to eyewitness identifications.[197] Research has shown that those factors that affect the accuracy of an eyewitness identification are largely unknown to the average juror.[198] For example, most people believe that witnesses better remember the details of a violent crime than of a nonviolent crime despite that research shows that the opposite is true.[199] Another common belief that runs contrary to scientific data is that the more confidence a witness exhibits in an identification, the more accurate that identification is likely to be; however, there is no consistent relationship between witness confidence and accuracy.[200] Thus, incorrect perceptions held by jurors may contribute

195. *See* DAVID L. FAIGMAN ET AL., SCIENCE IN THE LAW: SOCIAL AND BEHAVIORAL SCIENCE ISSUES § 8-1.1 370 n.3 (West Group 2002); Henry F. Fradella, *Why Judges Should Admit Expert Testimony on the Unreliability of Eyewitness Testimony*, 2006 FED. CTS. L. REV. 3, 23 (citing PAUL C. GIANELLI & EDWARD J. IMWINKELRIED, SCIENTIFIC EVIDENCE § 9.2(C) 434–39 (3d ed. 1999)); O'Hagan, *supra* note 57, at 757 (citing United States v. Benitez, 741 F.2d 1312, 1315 (11th Cir. 1984)).

196. *See* Fradella, *supra* note 195, at 23–29; O'Hagan, *supra* note 57, at 742 (asserting that courts should admit eyewitness expert testimony); Christopher M. Walters, Comment, *Admission of Expert Testimony on Eyewitness Identification*, 73 CAL. L. REV. 1402 (1985).

197. See Fradella, *supra* note 195, at 25; O'Hagan, *supra* note 57, at 760–61.

198. *See* O'Hagan, *supra* note 57, at 760; *see generally* Kenneth A. Deffenbacher & Elizabeth F. Loftus, *Do Jurors Share a Common Understanding Concerning Eyewitness Behavior?*, 6 LAW & HUM. BEHAV. 15 (1982) (reporting a study finding that participants did not share a common understanding of factors impacting eyewitness behavior). In fact, when surveyed, potential jurors answered correctly only approximately fifty percent of questions pertaining to human perception. LOFTUS, *supra* note 58, at 172–77.

199. *See* Elizabeth F. Loftus, *Ten Years in the Life of an Expert Witness*, 10 LAW & HUM. BEHAV. 241, 250 n.8 (1986).

200. *Id.* Even the United States Supreme Court has previously noted that confidence is a factor for consideration in determining whether an identification is sufficiently reliable. *See* Manson v. Brathwaite, 432 U.S. 98, 114 (1977); Neil v. Biggers, 409 U.S. 188, 199 (1972).

to why jurors generally believe eyewitness testimony, even when there is reason to doubt the accuracy of an identification.[201]

As such, in order to improve jurors' ability to determine the accuracy of an eyewitness identification, courts should admit eyewitness testimony to assist the trier of fact in understanding how the memory, retrieval, and perception processes work, as well as how circumstances surrounding an identification can affect the accuracy of the identification,[202] instead of assuming that cross-examination alone will result in the jury drawing all necessary and proper inferences regarding eyewitness reliability.[203] The expert would merely serve to increase a juror's ability to evaluate the eyewitness identification by relaying the results of studies, as well as how those studies apply to the "real world," without commenting on the credibility or reliability of a particular witness.[204] For example, the expert might comment on how stress can affect the reliability of an identification.[205]

Such testimony is appropriate as it is "the form of social science evidence which is most solidly based in 'hard' empirical science"[206] in that

> [e]xpert testimony concerning the limitations and weaknesses of eyewitness identification is firmly rooted in experimental foundation, derived from decades of psychological research on human perception and memory as well as an impressive peer review literature. Like [battered women's syndrome or rape trauma syndrome] evidence, this testimony purports to educate the factfinder about reasons a witness at trial should be believed or disbelieved. The expert is prepared to testify about the factors that adversely affect accuracy (for example, stress, "weapon focus," and confusion of post-event information) and to contradict assumptions likely to be shared by jurors, such as the equation of the witness's level of certainty with the accuracy of the identification.[207]

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201. *See* Walters, *supra* note 196, at 1408 (1985) (hypothesizing that "incorrect commonsense inferences" by jurors "may well contribute to [juror] overconfidence in eyewitness testimony"). *But see* LOFTUS, *supra* note 58, at 8–19 (explaining that one study conducted indicated that jurors' belief of a witness was not altered by the knowledge that the eyewitness had 20/400 vision).

202. Unfortunately, many federal courts have been reluctant to admit expert testimony pertaining to eyewitness identifications. *See* O'Hagan, *supra* note 57, at 757–66 (explaining that courts have been reluctant to admit such testimony and listing the reasons cited by courts in refusing to admit such testimony).

203. Walters, *supra* note 196, at 1407 ("[E]yewitness-expert testimony typically focuses on two major subject areas: how the processes of perception, memory, and retrieval of information work in general, and how specific circumstances surrounding an identification at issue may have affected its accuracy.").

204. *Id.* at 1406.

205. *Id.* at 1407 (discussing the Yerkes-Dodson law, which states that although moderate stress may lead to more acute perception, high levels of sustained stress can result in a decline of identification accuracy).

206. Mark S. Brodin, *Behavioral Science Evidence in the Age of* Daubert*: Reflections of a Skeptic*, 73 U. CIN. L. REV. 867, 889 (2005).

207. *Id.* at 890.

Hence, courts should regularly permit the use of expert testimony pertaining to eyewitness identification, especially in the context of showup identifications, given the lax rules of admissibility for such identifications and, more importantly, jurors' propensity to believe such identifications. Such expert testimony will likely help jurors understand how to process information regarding eyewitness testimony, decreasing juror reliance upon suspect showup identifications.[208]

VII. CONCLUSION

Showup identifications are extremely problematic eyewitness identifications. Yet, the admissibility requirements for showup identifications are lax and jurors have a propensity to believe such identifications regardless of their reliability. In addition, police officers have little motivation to utilize methods of identification that are more reliable than showups, such as lineups, given the present legislative mandates, internal police rules, and lenient admissibility requirements.

Given the compelling problem presented by the high number of individuals who are or likely will be wrongly convicted on the basis of showup misidentifications and this problem's multifaceted nature, a comprehensive approach to address the problem is necessary. Such an approach must ensure the greatest possible reduction in police usage of showup identification procedures, the greatest possible increase in the reliability of the showup identifications that must be conducted, and the greatest possible increase in the protection of a showup target's constitutional rights. To accomplish these beneficial outcomes, changes in police procedures are necessary, regardless of the impetus for such changes. Further, the admissibility rules governing showup identifications must be made significantly more stringent and more in compliance with the guarantees of the Due Process Clause and the Sixth Amendment. Finally, courts, in general, should admit expert testimony regarding eyewitness identifications. Such comprehensive changes will likely have a profoundly positive effect on our criminal justice system, with minimal additional strain on police officers, attorneys, and judges.

208. In the same vein, in order to decrease jury reliance on showup misidentifications, judges could give uniform instructions focusing a jury's attention on several important factors that can affect a witness's ability to accurately identify a defendant.